DOCKET FILE COPY ORIGINAL RECEIVED
JUN - 6 2003
Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	EB Docket No. 03-96
	)	
NOS COMMUNICATIONS, INC.,	)	File No. EB-02-TC-119
AFFINITY NETWORK INCORPORATED and	)	
NOSVA LIMITED PARTNERSHIP	)	NAL/Acct. No. 20033217003
	)	
Order to Show Cause and Notice	)	FRN: 0004942538
of Opportunity for Hearing	)	

To: Honorable Arthur I. Steinberg
Administrative Law Judge

JOINT MOTION FOR PROTECTIVE ORDER

NOS Communications, Inc. ("NOS"), Affinity Network Incorporated ("ANI"), NOSVA Limited Partnership ("NOSVA") and their principals (specially appearing), by their attorneys and pursuant to FCC Rule §§ 1.45, 1.243, 1.248 and 1.313 jointly move the Presiding Administrative Law Judge ("ALJ") for a protective order with respect to the May 27, 2003 Request for Admissions of Facts and Genuineness of Documents ("Admissions") filed by the Enforcement Bureau ("Bureau"). NOS requests that the ALJ require the Bureau to serve individual tailored admission request directed to separate named parties of no more than 50 requests per respondent party. In support thereof, the following is shown:[1]

On May 27, 2003, the Bureau served its Admission addressed to all of NOS, ANI, NOSVA (collectively the "Companies") and the unidentified and unnamed principals of the Companies. The Admissions are set forth in an 88-page document. Those 88 pages include 645 separate admissions.

---

[1] On May 30, 2003, NOS filed a motion for extension of time to respond to the Admissions. Since that time counsel has had the opportunity to conduct a more fulsome review of the Admissions. That review raises the issues addressed herein.

No. of Copies rec'd 0+6
List A B C D E

In addition to the 88-page 645 admissions, the document includes 22 attachments. Those 22 attachments include seven cassette tapes -- allegedly of telephone calls between employees of one or more of the Companies and their past or present customers. Those attachments also include some 450 pages of documents as to which the Bureau is requesting admissions of genuineness. Review of certain of these transcripts indicate that large portions thereof are totally irrelevant to this proceeding. *See, e.g.,* Admission, Exhibit G, pp. 43-84.

The Bureau's Admissions are improper for several reasons. First, FCC Rule § 1.246 provides that admissions must be filed on a party. The Admissions are improper because the Bureau has addressed a single set of admissions to multiple parties, some of whom it has omitted even to name, i.e, the unnamed principals of the Companies. It is impossible to respond to such a filing, especially in the procedural context of this case where the Show Cause Order purported to make unnamed principals parties to the proceeding, but omitted to make the Companies parties. Compounding this problem is that the Admissions define NOS/ANI to include "all directors, officers, employees, shareholders or agents, including consultants and any other persons working for or on behalf of any of the foregoing during the period 2001 through 2003." Admissions at 2.[2] Thus, the Bureau purports to require a response from various persons who are not even arguably parties to this proceeding. Accordingly, a protective order is required mandating the Bureau to limit its admission requests to those persons who in actuality are parties to this proceeding. We note at this

---

[2] It is plain from review of the Admissions that this expansive definition establishes the set of "parties" from whom the Bureau expects a response. As the Bureau states, "NOS/ANI, *as defined below*, is reminded that '[a] denial shall fairly meet the substance of the requested admission, and when good faith required that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as true and deny only the remainder.' 47 CFR §1.246(b)." Admissions, at 1 (emphasis added).

time, the identity of all the parties to this proceeding is unclear for the reasons set forth in the Companies' May 7, 2003, Petition for Reconsideration.

Second, presumably the Bureau appears to expect a single response to its single submission. Otherwise, how can any fact admitted by one party, but denied by another, be established except through normal evidentiary procedures? A single response, however, is problematic since each party -- whoever might in fact be a party to this proceeding in light of the ambiguous drafting of the Show Cause Order -- in fairness ought to be entitled to respond separately to the Admissions. The Companies are therefore confronted with the issue of how they can meaningfully respond to such a submission as the Bureau has filed. Since one consolidated response is impossible, how exactly are the various parties to respond? Respondents believe the answer is obvious. The Bureau's shotgun Admissions are deficient since they are neither separately addressed to individual respondent parties, nor tailored toward individual parties. Thus, some Admissions apply to one or more of the respondents while others apply to other respondents. Yet, apparently, the Bureau somehow expects a response to all its Admissions that would bind each respondent.

We think it is incumbent on the Bureau to serve tailored admissions on individual respondent parties, rather than to proceed by the scattershot approach embodied in its Admissions. Accordingly, the Presiding ALJ should issue a protective order requiring the Bureau to serve tailored admissions on individual respondent parties. *Cf. Syracuse Broadcasting Corporation v. Newhouse*, 271 F.2d 910 (2nd Cir. 1959) (ill-conceived admissions may be stricken entirely).[3]

---

[3] Since FCC Rule § 1.248 is modeled on Fed. R. Civ. P. 36, federal cases interpreting the rule have precedential value.

Third, the ALJ should issue a protective order limiting to no more than 50 the number of admissions served on any one respondent party. The Presiding Officer has the authority to ensure that parties are not unduly burdened with excessive discovery requests. *See* FCC Rule § 1.313. Moreover, he has the overall authority to prescribed procedures for the appropriate conduct of this proceeding. *See* FCC Rule § 1.243. This case calls for use of that authority to prevent an undue burden on the respondents.

The Bureau's service of more than 600 admission requests is excessive and burdensome. As the commentators have explained, "a request for admissions is not a discovery tool in the truest sense, but, rather, is a procedure for obtaining admissions for the record of facts already known." 8 C. Wright & A Miller, Federal Practice and Procedure: Civil § 2253 (1970). Further, admissions "should not be of such great number and broad scope as to cover all the issues [even] of a complex case," and "[o]bviously ... should not be sought in an attempt to harass an opposing party." *Lantz v. New York Central Railroad Co.*, 37 F.R.D. 69, 69 (N.D. Ohio 1963). The Advisory Committee on the Federal Rules of Civil Procedure has previously recognized that a protective order is a proper remedy where the requests to admit are "so voluminous and so framed that the answering party finds the task of identifying what is in dispute and what is not unduly burdensome." Notes of Advisory Committee, 1970 Amendment, Fed. R. Civ. P.

Moreover, review of the Bureau's Admissions show them in many instances to be argumentative,[4] vague,[5] calling for legal conclusions,[6] calling for beliefs of third parties,[7] or simply impossible to answer intelligibly given the Bureau's expansive definition of NOS/ANI.[8] In similar circumstances courts have employed their supervisory authority over the conduct of discovery to protect parties from undue burden. *See United States v. Medtronics, Inc.*, 2000 WL 1478476 (D. Kan.) (striking 506 item, 105 page admissions request); *Mitchell v. Yeutter*, 1993 WL 139218 (D. Kan.) (reciting previous rulings striking 184, 169 and 90 admission requests as excessive, but approving a total of 40 admissions); *Minnesota Mining and Manufacturing Company v. Norton Company*, 36 F.R.D. 1 (N.D. Ohio 1964) (sustaining objections to 370 admission requests as oppressive and burdensome).

The Bureau should well be able to accomplish its objective of simplifying the issues in this case within a 50 item admission request per party if it abjures argumentative admissions, admissions

---

[4] *See, e.g.*, Requests 92, 94, 95, 96, 118, 119, 141.

[5] *See, e.g.*, Requests 12, 19, 23, 24, 26, 27, 45, 206 .

[6] For example, certain admission requests interpretative of provisions of the Communications Act or the Commission's rules. *See, e.g.*, Requests 35-40, 103, 111-113, 157, 176, 221.

[7] *See, e.g.*, Requests 123, 127, 131, 135 and 150.

[8] For example, Request 1 states, "NOS/ANI operates as a common carrier under Title II of the Act." As defined by the Bureau, however, this request means that "all directors, officers, employees, shareholders or agents, including consultants and any other persons working for or on behalf of any of the foregoing during the period 2001 through 2003" operate as a common carrier under Title II of the Act. Aside from the fact that this Request calls for a legal conclusion and is therefore objectionable on that basis, there is not meaningful response possible to such a confused request other than a denial. That denial in turn would have to be supported with affidavits of the multitude of persons the Bureau classes inappropriately as "NOS/ANI."

calling for legal conclusions, admissions calling for the beliefs of third parties and other improper admission requests. This was how FTC Administrative Law Judge Chappell in *In re Schering-Plough Corporation*, 2001 WL 1529271 (2001) handled a similar situation. There examining both the purpose of the admissions rule, and federal and state authority interpreting the rule, the ALJ found 477 requests directed to one party by FTC counsel and 339 directed to another party to be unreasonable and granted a protective order limiting FTC counsel to no more than 100 admission requests per party.[9] As ALJ Chappell explained it, properly used, admissions save "time, trouble and expense" for the court and litigants. *Schering-Plough,* 2001 WL 1529271, at *2, citing *Metropolitan Life Insurance Co. v. Carr*, 169 F. Supp. 377, 378 (D. Md. 1959). "Because requests for admission are intended to save time of the parties and the court, burdensome requests distort that purpose and therefore are properly the subject of a protective order. *Wigler v. Electronic Data Systems Corp.*, 108 F.R.D. 204, 207 (D. Md 1985)." Id. The ALJ further explained that limitations on the number of permissible requests is common in both federal and state courts, through either local rules or scheduling orders. *See id.* at *2. The Companies suggest a similar approach is required here. Accordingly, the requested protective order should be issued limiting Bureau counsel to no more than 50 admissions per named respondent party.

For the foregoing reasons, the Companies request the issuance of a protective order requiring the Bureau to file individually tailored admissions address to individual parties of no more than 50 admissions per party.

---

[9] A copy of the FTC ALJ's order is attached for the Presiding ALJ's convenience.

Respectfully submitted,

Russell D. Lukas
George L. Lyon, Jr.
LUKAS, NACE, GUTIERREZ & SACHS, CHARTERED
1111 19th Street, NW, Suite 1200
Washington, D.C. 20036
(202) 857-3500 (voice)
(202) 828-8424 (facsimile)

Attorneys for
NOS Communications, Inc.

Danny E. Adams
Philip V. Permut
W. Joseph Price
M. Nicole Oden
KELLEY DRYE & WARREN, LLP
Tysons Corner
8000 Towers Crescent Drive, Suite 1200
Vienna, VA 22182
(703) 918-2300 (voice)
(703) 918-2450 (facsimile)

Counsel for
Affinity Network, Inc.
NOSVA Limited Partnership
and the Principals of
NOS Communications, Inc.
Affinity Network, Inc., and
NOSVA Limited Partnership

June 6, 2003

2001 WL 1529271 (F.T.C.)
(Publication page references are not available for this document.)

In the Matter of Schering-Plough Corporation, a corporation, Upsher-Smith Laboratories, a corporation, and American Home Products Corporation, a corporation.
Docket No. 9297
November 2, 2001

ORDER ON MOTIONS OF SCHERING-PLOUGH AND UPSHER-SMITH FOR A PROTECTIVE ORDER

I.

On October 15, 2001, Respondent Schering-Plough Corporation ("Schering") filed a motion for a protective order. Schering seeks to have stricken Complaint Counsel's Second Requests for Admissions Served on Schering on October 2, 2001 ("Second Requests"). On October 17, 2001, Respondent Upsher-Smith Laboratories ("Upsher-Smith") filed a joinder in Schering's motion for a protective order. Upsher-Smith seeks to have stricken Complaint Counsel's Second Requests for Admissions Served on Upsher-Smith on October 2, 2001 ("Second Requests"). Respondents also moved for an order staying their obligation to respond to the Second Requests until after a ruling on the motions for protective order. By Order dated October 19, 2001, Schering and Upsher-Smith were relieved of their obligation to respond to the Second Requests until after an order on the motions for a protective order was issued.

On October 25, 2001, Complaint Counsel filed an opposition to the motion of Schering and joinder motion of Upsher-Smith.

On October 30, 2001, Respondents filed a joint motion for leave to file reply to Complaint Counsel's opposition to the motions for protective order. Respondents' request to file a reply brief is GRANTED.

For the reasons set forth below, Schering and Upsher-Smith's motions are GRANTED IN PART.

II.

Schering asserts, first, that the number of requests for admission - 477 - is overly burdensome and that the burden outweighs any likely benefit to Complaint Counsel. Schering further asserts that numerous requests are improper because they: (1) seek admissions with respect to the primary disputed issues in the case; (2) ask Schering to admit the contents of documents and deposition testimony; and (3) improperly seek new fact discovery that should be the subject of interrogatories, but for the limit on interrogatories in this matter. Upsher-Smith joins in the arguments advanced by Schering. The number of requests for admission served on Upsher-Smith is 339. Complaint Counsel responds by asserting that the requests are not unduly burdensome and that the particular admissions identified by Schering as objectionable are properly directed at narrowing the contested issues for trial.

III.

The number of requests for admission is not limited by the Commission's Rules of Practice unless the Administrative Law Judge orders otherwise. 16 C.F.R. § 3.31(a). Pursuant to Section 3.31(d) of the Commission's Rules of Practice, the Administrative Law Judge has the power to issue a protective order whenever one is needed to "protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense." 16 C.F.R. § 3.31(d). Further, the frequency or extent of use of requests for admission shall be limited by the Administrative Law Judge if he determines that "the discovery sought is unreasonably cumulative or duplicative, or

Copr. © West 2003 No Claim to Orig. U.S. Govt. Works

is obtainable from some other source that is more conventional, less burdensome, or less expensive," and when "the burden or expense of the proposed discovery outweigh its likely benefit." 16 C.F.R. § 3.31(c).

Federal case law interpreting the analogous Rule 36(a) of the Federal Rules of Civil Procedure which allows the service of requests for admission upon parties to civil actions indicates the purpose of this rule is to reduce the cost of litigation, Burns v. Phillips, 50 F.R.D. 187, 188 (N.D. Ga. 1970), by narrowing the scope of disputed issues, Webb v. Westinghouse Electric Corp., 81 F.R.D. 431, 436 (E.D. Pa. 1978), facilitating the succinct presentation of the case to the trier of fact, Ranger Ins. Co. v. Culberson, 49 F.R.D. 181, 182-83 (N.D. Ga. 1969), and eliminating the necessity of proving undisputed facts. Peter v. Arrien, 319 F. Supp. 1348, 1349 (E.D. Pa. 1970). Properly used, requests for admission serve the expedient purpose of eliminating "the necessity of proving essentially undisputed and peripheral issues of fact." Syracuse Broadcasting Corp. v. Newhouse, 271 F.2d 910, 917 (2d Cir. 1959). Their proper, strategic use saves "time, trouble, and expense" for the court and the litigants. Metropolitan Life Insurance Co. v. Carr, 169 F. Supp. 377, 378 (D. Md. 1959). Because requests for admission are intended to save time of the parties and the court, burdensome requests distort that purpose and therefore are properly the subject of a protective order. Wigler v. Electronic Data Systems, Corp., 108 F.R.D. 204, 207 (D. Md. 1985).

A limitation on the number of permissible requests for admission is common practice in federal courts, either through local rules of the district courts or through scheduling orders. E.g., District of Maryland Local Rule 104.1 (limiting to 30); Western District of Texas Local Rule CV-36 (limiting to 30); Scherer v. GE Capital Corp., 2000 US Dist. LEXIS 3539 (March 21, 2000) (scheduling order limiting to 25). Scheduling orders entered in other administrative litigation have also limited the number of requests for admission. E.g., In re Dura Lube Corp., 1999 FTC LEXIS 248, *2 (June 10, 1999) (limiting the number of requests for admission to 50). In addition, federal courts have limited the number of requests for admission where the number served is found to be excessive. E.g., Mitchell v. Yeutter, 1993 U.S. Dist. LEXIS 5619, *3 (D. Kan. 1993) (holding 184 requests for admission excessive and limiting the party to 40); Phillips Petroleum Co. v. Northern Petrochemical Co., 1986 U.S. Dist. LEXIS 21473 (N.D. Ill. 1986) (finding 437 requests for admission an inappropriate attempt to circumvent the limit on interrogatories and limiting the party to 20); Trabon Engineering Corp. v. Eaton, 37 F.R.D. 51 (N.D. Oh. 1964) (where plaintiff addressed 146 requests for admission and defendant objected to 79 of them as burdensome, the court sustained objections of burdensomeness to 56 of the requests).

Though Rule 3.32 does not itself impose a limit on the number of requests for admission that may be served, it is clear that some reasonable number of requests is contemplated since the rule allows only ten days to respond to requests for admission. 16 C.F.R. § 3.32. Four hundred seventy seven requests and three hundred thirty nine requests are not reasonable numbers. Accordingly, Complaint Counsel's requests for admission will be limited. 16 C.F.R. § 3.31.

Respondents' motions for a protective order are hereby GRANTED IN PART. Complaint Counsel may serve revised second sets of requests for admission on Schering and Upsher-Smith wherein Complaint Counsel may select no more than 100 of the previous 477 requests for admission served on Schering on October 2, 2001, and no more than 100 of the previous 339 requests for admission served on Upsher-Smith on October 2, 2001. Complaint Counsel has until November 6, 2001 to serve such revised second sets of requests for admission on Schering and Upsher-Smith. Schering and Upsher-Smith have seven calendar days to respond.

Because Respondents' motions are granted in part on the foregoing grounds, the remaining arguments raised by Respondents need not be addressed.

ORDERED:

D. Michael Chappell

Administrative Law Judge

FTC

Copr. © West 2003 No Claim to Orig. U.S. Govt. Works

(Publication page references are not available for this document.)

END OF DOCUMENT

Copr. © West 2003 No Claim to Orig. U.S. Govt. Works

CERTIFICATE OF SERVICE

I, Jennifer C. Colman, do hereby certify that on this 6th day of June, 2003, a copy of the foregoing "Joint Motion For Protective Order " was sent via US First Class Mail to the parties listed below:

Honorable Arthur I. Steinberg
Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W., Room 1-C861
Washington, D.C. 20554

Maureen F. Del Duca, Esq.
Gary Schonman, Esq.
Hillary DeNigro, Esq.
Donna Cyrus, Esq.
Investigations & Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th St., S.W., Suite 3-B443
Washington, D.C. 20554

Danny E. Adams, Esq.
Kelley Drye & Warren LLP
Tysons Corner
8000 Towers Crescent Drive
Suite 1200
Vienna, VA 22182

Jennifer C. Colman